REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 983 of 2004

1. **JIMMY R. KAVILU)**
2. **BERNADETTE KARIUKI)**
3. **JOHN NJUGUNA NGANGA)**
4. **JOHN A.H. OPIAYO)**
5. **DOUGLAS MAKIMI)**
6. **JANE WAHU MWANGI)**
7. **JOHN GACHAMBA GACHOKA)**
8. **KEZIAH NJERI MUNGAI)**
9. **PRISCA NYALWAL)**
10. **CECILIA KAGIKA)**
11. **LEONORA ACHIENG SUNGA)**
12. **JANE ALICE ABEKA)**
13. **SALOME K. KILONZO)**
14. **JULIUS MAINA MWAURA)**
15. **ABDUL BASHEIKH .....PLAINTIFFS**

VERSUS

1. **STANBIC BANK KENYA LTD.**
2. **PHILIP SAMUEL ODERA**
3. **MAURICE TOROITICH**
4. **WILSON ODADI**
5. **CHRISTINE SABWA**

6. WENDY MUKURU

7. PETER MAKAU.....DEFENDANTS

RULING NO.2.

The Plaintiffs moved to this Court vide an original plaint dated 20th day of September, 2004 which plaint was subsequently amended on 29th day of June 2005. There was also filed a Re-amended plaint which has been faulted in ruling number 1. The defendants were duly served and they entered appearance and filed a defence to which the plaintiffs responded by filing a reply and an Amended reply to defence. The Court has been informed that on these pleadings was anchored an interim injunctive relief application which gave rise to consent orders which are still in place.

The defendant then moved to this court vide a preliminary objection dated 4th September 2006 and filed the same date, Contending that this Court has no jurisdiction to entertain the said suit and that the proper forum for adjudication is the administrative mechanism provided for under the RBA through the Chief executive officer and the tribunal established under the said Act.

It is on record, in the arguments that formed the basis for the first ruling that the said preliminary objection was pursued on two limbs. The first limb was a contention that the Re-amended plaint was irregularly on record as it was filed without leave of the court, and as such it is a proper candidate for striking out. The second limb dealt with arguments on lack of jurisdiction on the part of this court to hear and dispose off the suit.

This court heard both sides on the said preliminary objection and has ruled in ruling number 1, upholding the faulting of the filing of the Re-amended plaint without leave for the reasons given in that ruling. It however dismissed the objection on lack of jurisdiction by the Court to entertain the suit.

This court went on to rule on the said ruling No.1 that the faulting of the Re-amended plaint as well as its being struck out ushered in the Amended plaint as the operational plaint with leave to the Plaintiff to go back on to their drawing board and seek Re-amendment procedurally in accordance with the law.

During the pendence of the writing and delivery of ruling No.1 developments come up tending to upset the litigating positions of the parties herein. This prompted the plaintiffs to come to this court vide a chamber summons dated 2nd May 2008 and filed on 6th may 2008. It is brought under order 38 rules 5,6 and 12, order 39 rules 1,2, 2A and 3 of the Civil Procedure Rules, Section 3A, 63(e) of the Civil Procedure Act Cap.21 Laws of Kenya and all other enabling provisions of the law.

The application was certified urgent by the duty judge and placed before this court on the same date of 7.5.2008. Interim orders were granted and the plaintiff/applicant was ordered to serve the respondent.

Upon service, upon them of the said application, the Respondents responded by filing a notice of motion under Order 39 rule 4 Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

In addition to the application the defence filed grounds of opposition to the plaintiff's application where as the plaintiffs put in a replying affidavit to the defence's notice of motion seeking to discharge the interim injunctive relief that had been accorded to the plaintiff/applicant.

Due to the urgency of the matter, parties, filed written skeleton arguments and matters was then heard.

The prayers being sought by the plaintiff/applicant are:-

(1) The first defendant by itself, its servants, agents and/or its Advocates, or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them that is to

say, from proceeding with the proposed merger with CFC BANK LTD PURSUANT to the merger agreement or scheme of agreement dated 22nd June 2007 or with any merger plans with any institution or both at all or taking any steps to finalize or consummate the proposed merger otherwise howsoever described or structured now or at any other time now or in the future or completing any conveyance or transfer of its banking business, its undertakings, or assets liability shares or property of the first defendant in whatever or nature concluded pursuant to the said merger Agreement or scheme of Arrangement dated 22nd June 2007 or at any other time now or in the future pending the hearing and determination of this suit and this order be placed for public notice in both the Daily Nation and the Standard Newspapers immediately for advertisement.

(2). That in the alternative to prayer 2 above, the court be pleased to order the 1st defendant to furnish security by depositing into this Honourable Court the sum of Ksh 1,156,213,244,20 or to produce and place at the disposal of this Honourable court such acceptable security or guarantee acceptable to the plaintiff in such prescribed form and manner from a reputable bank or banks licensed to conduct the business of banking in Kenya and/or in their country or in corporation if a foreign institution and to place the same under the control of this Honourable Court within Kenya valued at Kshs.1,156,213,244.20 or the value of the same or such portion as the court may deem sufficient to satisfy the plaintiffs claim or any judgment or decree that maybe passed by this Honourable court within a specified time to be fixed by this honourable court and upon such terms and conditions that may be set or determined by this honourable court.

(3). That the first defendant do disclose to this honourable court its business and assets in Kenya and the same to be conditionally attached until the determination of the suit.

(4). That in default of furnishing such sufficient security deposit or bank guarantee as shall be ordered by this Honourable Court the first defendant do show cause why all sums of money due to it from business and any assets should not be attached by the court pending judgement by this honourable court and that costs be provided for.

The major prayer in the defendants notice of motion dated 12th May 2003 and filed on the same date was prayer 3 which sought orders that this courts order issued on 8th May 2008 be stayed pending the determination of this application, the application of the plaints dated 2nd May 2008 and 7th may 2008 and that the said orders be vacated.

The grounds of opposition to the said application read:-

(1) The Honourable Court had no jurisdiction to issue the orders dated 8th May 2008.

(2) The 1st defendant has been subjected to an unfair trial in this matter.

(3) The application of the Plaintiffs are misconceived and bad in law.

(4) There is no cause of action against the 1st defendant to warrant the granting of prayers sought in the application.

(5) There is no prima facie case against the first defendant to warrant granting the prayers sought in the application.

(6) If the Court grants the Plaintiffs prayers the first defendant will suffer irreparable damage.

(7) The grounds relied upon by the Plaintiffs violate company law and the rules of the courts.

(8) The balance of convenience does not warrant the granting of the injunction.

The major complaints put forward by the plaintiffs in summary form are that:-

(1) The Plaintiffs herein have a pending claim in this Court and in these proceedings which has not been determined and satisfied.

(2) That the said 1st defendant is currently in the process of merging with CFC Bank Ltd which process will result in the 1st defendant being sold to CFC Bank Ltd in its entirety and its current share holders receiving as consideration for the sale shares in a new entity CFC Stanbic holdings Ltd.

(ii) The said move will also result in the first defendant becoming a wholly owned subsidiary of CFC Bank Ltd with both Banks then becoming one merged entity that will be wholly owned by yet to be created entity to be called CFC Stanbic holdings Ltd.

(iii) Further the banking business of CFC BANK LTD will be merged with or otherwise transferred to the 1st defendant so that CFC holdings Ltd will thereafter be the holding company of the 1st defendant as well as the other subsidiaries currently owned by CFC Bank limited and will be renamed CFC Standbic holdings Ltd while the banking business currently owned and operated by 1st defendant will be subsumed and merged with CFC Bank Ltd and renamed Stanbic Bank Ltd.

(3). They content that the 1st defendant has already received approvals from the regulatory bodies and the merger is intended to be effected end of May 2008 subject to the granting of the final approval by the Central Bank of Kenya.

(4). Their major complaint against the proposed merger is based on their assertion that the failure of the same to comply with the Banking Act Cap.488 Laws of Kenya does imply that 3rd party liabilities and obligations including those owed to the plaintiffs will be extinguished.

(ii) This will result in the 1st defendant transferring its understandings, property, liabilities either fixed, movable and intangible to CFC bank Ltd in the first instance and then to CFC Stanbic holdings Ltd in the second instance.

(iii The said transfer will mean that since the 1st defendants, balance sheet financial statement as at the 31st December 2007 does not recognize, Capture and reflect the claims by the Plaintiffs, the said transfer will result into the consolidation of the accounts of both the 1st defendant and CFC Bank Ltd and the said consolidated accounts of both the 1st defendant and CFC Bank Ltd will or may not recognize, capture and reflect the claim by the Plaintiffs.

(iv) The situation depicted in number (iii) above might lead to a situation whereby the Plaintiffs will not be in a position to enforce any judgment against the new entity should they succeed in their claim against the defendants.

(5). They urge this court, that since the Plaintiffs' claim against the defendants pre-date the merger, this court, should not permit the existence and or creation of a situation where by the 1st defendant's assets will be moved to a location whereby they will be shielded, sheltered and or protected or placed beyond the reach of the Plaintiffs herein.

(6). The applicants are also apprehensive that the proposed merger might create an avenue where by the new entity may be allowed to repudiate pre-existing claims of the plaintiffs to its predecessor the 1st defendant.

(ii) this fear and or apprehension has bean made more real by the fact that the 1st defendant has neglected and or refused to confirm and a sure the plaintiffs that the in common entity is ready and willing to take over and make good their claims should they succeed. It is therefore their stand that they have made out a case sufficiently enough to warrant, this Court, to grant them the relief they seek at this interim stage.

In their oral high lights counsel for the plaintiffs reiterated the grounds in the body of the application as well as the supporting affidavits and then stressed the following points:

(1) Once the merger is allowed to progress without securing the interests of the plaintiffs, the 1st defendant will cease to exist in its current and the newly created entity will be out of reach of the plaintiffs in their move to satisfy any judgment that may be passed against the first defendant.

(2) They also maintain that from the documentation being displayed herein, the Plaintiffs claim has not been recognized in the merger documents hence the difficulty to execute the same should they succeed in their case. It also runs the risk of being rendered nugatory.

(3) The best way to safeguard the interests of the Plaintiffs in to have the entire claim placed at the dispose and/or protection of the Court.

(4) They have also raised issue of an illegality being committed by the proposed merger which this court should not loose sight of.

(5) They have demonstrated that in the facts and the documentation placed before Court they have a prima facie case with a probability of success. They have also demonstrated that the Plaintiffs stand to suffer irreparable loss and the balance of convenience is also in their favour and as such the relief being sought is well earned.

The defendants on the other hand in their written skeleton arguments have put forward the following grounds in opposition to the plaintiff's application.

(1) The plaintiffs claim is directed to the Stanbic Bank Kenya Limited staff and life Assurance Scheme established by a trust deed dated 11th January 1978 with own trustees and the 1st defendant only connection with it is because it is a Sponsor of the fund.

(ii) The suit is not about monthly contributions but about benefits which the plaintiffs claim should have been paid out of the fund to them. For this reason the proper person to deal with the plaintiffs claim are the trustees under the provisions of the said RBA and thus Plaintiffs are pursuing a wrong party to satisfy their claim.

(2) There is no cause of a alarm over the proposed merger as the same merely involves transfer of shares change of names and acquisition of additional business portfolio by the 1st defendant which activity has not been shown to be prejudicing the plaintiffs in any way.

(3) It is also their stand that the interim order for injunction subject of this subsequent proceeding should not have been issued before delivery of the ruling which has been pending for this court to determine whether it has jurisdiction to deal with the matter or not.

(4) They contend that there has been no disclosure of any really danger to the plaintiffs rights save that fear and apprehension which is a lien to any proceedings.

(5) Their stand is that the Plaintiffs fear and apprehension is unfounded because a transfer of shares between an existing share holder and a prospective share holder does not amount to a disposition of property, assets or liabilities. The shares are being transferred for value making the first defendant to become more financially viable and as such there should be no cause of alarm.

(6) They still maintain that the proposed merger will not affect the find in any way in so far as funds are already deposited there in is concerned.

(7) The Court is urged not to allow the reliefs being sought as they seek to condemn other parties not heard.

In his oral high lights learned Counsel reiterated their stand in the written skeleton arguments and then stressed the following points:-

(a) Since the Plaintiffs claim is in respect of finds which should have been paid out to them from the find sponsored by the 1st defendant, the injuncting relief should not have been sought against the 1st defendant. It does not have the finds being sought.

(b) Although by virtue of the intended merger process the first defendant will change its name, it will nonetheless retain its company registration status.

(c) They maintain that the current application should not have been brought and interim orders obtained on the same before the court ruled as to whether it had jurisdiction to entertain the suit or not.

(d) Further that the move to merge the 1st defendant is a move initiated and sanctioned by the shareholders and as such this should not be blamed on the corporate entity which is the first defendant.

(e) They also content that the new developments in the status of the 1st defendant which is sought to be catered for by the current application are new issues not captured in the pleading and as such they cannot be relied upon to support an injunctive relief in the manner sought.

(f) The Plaintiff applicant cannot take refugee under the inherent jurisdiction of the courts provisions as these have to be anchored on a found jurisdictional base vested in the court and where the jurisdiction of the court is being questioned, the courts inherent power cannot be invoked.

(g) The merger process has been processed 60%. The government is also involved in the process and if any injunction is given in the process, it will mean that the government is being injuncted un procedurally.

(h) The Court was also urged to take note of the mischief behind the plaintiff applicants move at this belated hour in that they were all along aware of the merger process since November, 2007 and only waited till the time when they realized that the merger is about to be concluded that they came to court to seek an injunction.

(i) The court is urged not to allow the injunctive relief sought because it is going to affect many innocent participants not party to the suit.

(j) They maintain the balance of convenience does not tilt in favour of the applicant but tilts in favour of the 1st defendant.

(k) No basis has been laid to warrant the court to order the first defendant to deposit the amount claimed in court.

In response orally in court Counsel for the applicant stated that if the 1st defendants is sold, it will remain a shell which cannot satisfy the plaintiffs claim.

(b) They maintain that illegality need not be pleaded and can be raised in the manner they have raised it.

(c) That main reason they have moved in the manner they have moved against the 1st defendant is because he is the sponsor of the fund and if it changes its identify and there is a shortfall in favour of the plaintiffs, it will be difficult to pursue the new entity and as such it is better for the plaintiff to take precaution than allow the merger to go through without securing protection of the plaintiffs rights and then later on run into problems.

On case law the plaintiffs Counsel relied on the case of SAMWEL KARUGA KOINANGE VERSUS

BULLION BANK LTD NAIROBI MILLIMANI COMMERCIAL Court case number 951 of 2000. The brief facts are that the Plaintiff/Applicant sought leave to restrain the defendant bank from merging and or transferring or disposing of assets to any other bank pending hearing and final determination and in the alternative that the bank do provide a security for shs 10,500,000/= to be deposited in a joint account pending final determination.

At page 13 of the said ruling the learned judge at line 4 from the top made observation that it had been argued on behalf of the defence to the effect that the liability of the plaintiff will become the liability of the merged bank and so the Plaintiff will be no worse off may be even better of because after the merge, or acquisition, the plaintiff will have recourse to the combined assets of both banks. The learned judge's response was as follows "*That is true as far as it goes but what it over looks is that, not only will the assets of the two banks be combined but so also will the liabilities. There is no logic in saying that combine two struggling banks will result in one thriving Bank. The reverse is likely true and I was given no proforma balance sheets on which to make any sort of preliminary judgment*".

The net result of the assessment was that the security applied for was ordered to be deposited.

The case of SNELL VERSUS UNITY FIANCNE LTD [1963] AER 50 whose ruling is that once an illegality has been brought to the attention of the Court, the same should be ruled upon irrespective of whether the same had been pleaded or not.

The case of DIRECTOR OF PENSIONS VERSUS COCKER [2000]1 E.A.38 whose gist of the ruling is to the effect that pension is a right and there is no jurisdiction to deprive a party of his/her pension.

The case of B. VERSUS ATTORNEY GENERAL [2004] 1 KLR 431 where it was held inter alia that an injunctive relieve may be made against a government official in a proper case.

The case of GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358 where it was held inter alia that in order to qualify for an injunctive relief an applicant:

i. must show a prima facie case with a probability of success.

ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

iii. Where the court is in doubt it will decide the application on a balance of convenience.

The defence also referred the court to case law to support their stand. The case of owners of the MOTOR VESSEL LILLIAN'S VERSUS CALTEX OIL K LTD [1989] KLR was cited solely for purposes of stressing that where issues of jurisdiction is raised the court has a duty to decide the same before moving further in the matter. This has been disposed off in ruling No.1.

The case of DEPOSIT PROTECTIONFUND BOARD VERSUS KAMAU AND ANOTHEHR [1999} 2 EA (CAK 67) where it was held inter alia that the inherent jurisdiction of the court may only be called into aid within the confines of the jurisdiction by statute on the administration of justice but not the authority upon which to move the court for remedy .

The case of AIR ALFARAJ LIMITED VERSUS RAY THEON AIRCARFT CREDIT COPROATION AND ANOTHER [2000] KLR 624 where it was held inter alia that any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile.

The case of NAIROBI CITY COUNCIL VERSUS THABIT ENTERPRISES LTD [1995 – 98] 2 E.A. 231 where it was held inter alia that a judge had no jurisdiction or power to decide on issues which had

not been pleaded unless the pleading were suitably amended.

The case of KANORERO RIVER FARM LTD AND 3 OTHERS VERSUS NATIONAL BANK OF KENYA LTD [2002] 2 KLR 207 where it was held inter alia that interlocutory injunctive relief cannot be granted to restrain a breach of contract or other injury of any sort unless there is in place a suit in which an injunction to the same effect is sought.

The case of NKALIBO VERSUS KIBIGE [1973] E.A. 102 where it was held inter alia that introduction of a new cause of action should not be allowed without pleading.

The case of NDIRANGU VERSUS ABDALLA [1984] KLR 746 where the gist of the holding is that there is no power for the judge to order summary attachment of the defendant's property. Attachment can only be ordered where the defendant has failed to show cause why security should be furnished or where he has failed to comply with an order to furnish security.

The case of KANYOKO T/A AMIGOS BAR AND RESTAURANT VERSUS NDERU AND OTHERS [1986 – 89] E.A. 237 where the gist of the holding is that the onus is on the applicant to show that there is justification for the court to order the defendant to furnish security before judgment.

The case of DESAI VERSUS WARSAMA [1967] 350 to the effect that no Court can confer jurisdiction on itself.

The case of KENYA ARIWARYS CORPORATION LTD VERSUS TOBIAS OGANYA AUMA AND 5 OTHERS NAIROBI CA.350 OF 2002 where at page 39 line 3 from the bottom to pg.40 the law lords of the court of appeal made findings that

"*On the issue of provident find reserve claims for shs 10 million the observe that the fund is run by trustees who are independent from the appellant. Any claim thereto should therefore be directed at the trustees and not the appellant. Once again as correctly found by the superior court the claim against them would appear to be misplaced.*

On the courts assessment of the facts herein, there are a number of issues that have been raised by either side which need to be determined. The first issue is one touching on the courts jurisdiction to hear the matter. This was raised by the defence solely because the current application under consideration was interposed before this court had given its ruling on whether it has jurisdiction to hear the matter or not which ruling had been reserved. This reserved ruling has now been given and the court ruled that it has jurisdiction to entertain the plaintiffs claim as presented for the reasons given.

Issue was raised about the illegality of the proposed merger in that the plaintiffs Counsel has argued that the correct procedure has not been followed and that there are certain provisions of the banking Act as well as other related legislation which have been violated. As submitted by the defence Counsel these are substantive issues which can not be adequately handled at an interlocutory proceeding such as this one, especially when some of the alleged violators like the central bank and the Kenya government are not parties to these proceedings. For this reason this court will not delve into that issue. Of great importance to the plaintiffs is not so much the issues of illegality of the proposed merger but whether the proposed merger if it were to proceed in the manner proposed, is likely to seriously affect the outcome of this suit, should they succeed against the defendant. It is this courts opinion that the issue of whether the proposed merger is likely to affect the outcome of the case hence the need to protect the plaintiffs interests can comfortably be determined without necessarily determining the issue of illegality mentioned.

It is the finding of this court that the said complaint of the plaintiffs, for this interlocutory relief can be determined without necessarily making a pronouncement on the illegality mentioned. More so when the issue is not sought as one of the reliefs in the application. It came up in the submissions and supporting affidavits.

The defence have raised the issue of the plaintiffs pursing a wrong party namely the first defendant. It

is there stand that the fund is already with the trustees who should be followed. In response to this the plaintiffs Counsel has submitted that the 1st defendant is being followed because he is the sponsor of the fund and in the event of a short fall the trustees have to turn to the sponsor to meet the short fall. The courts findings on this is that this point should have been taken up by the defence as a substantive objection to their being sued as such. So long as the suit against them stands and has not been faulted, in their favour the court is entitled to continue treating them as proper parties to the proceedings and where appropriate order reliefs against them in favour of the plaintiffs.

The court is also of the opinion that having admitted that they are the sponsors of the scheme, and they not having refuted the plaintiff's assertion that the trustees have a right tot turn to the sponsor to meet the short fall in the event of any shortfall, they are properly being proceeded against by the plaintiffs in this application.

The defence also raised the issue that the proposed merger is harmless and will not prejudice the plaintiffs in any way and as such their fear and apprehension is unfounded. The Plaintiffs Counsel respondent to this by stating that the proposed merger will create new entitles and thus, is likely to alter the contractual relationship between the plaintiffs and the 1st defendant which might render the entire proceeding nugatory.

This court has perused the reasoning of the learned judge in the case of SAMWEL KARUGA KOINANGE (supra) which is to the effect that once the merger takes place the old licence will be revoked or will cease to operate. The old entity will also cease to exist and a licence will be issued to the new entity, the court finds that the plaintiffs were justified in moving in the manner they did in order to safeguard their interests, move so when it is on record that there is no averment or submission on the part of the defence that the plaintiffs claim has been taken care of in the proposed merger.

Having disposed off the preliminaries the court proceed to determine the really bone of contention namely the injunctive relief and in the alternative the provision of security.

On the granting of the injunctive relief the ingredients for earning the same are now well settled as set out in the GIELLA CASE (supra). All that the applicant has to do is to demonstrate that the same have been satisfied.

In addition to the ingredients mentioned above, the court, is also enjoined to weigh the injury to be suffered by the plaintiff if the injunction were to be denied and he succeeded in the ends and that to be suffered by the defendant if the injunctive relief were to be granted and the plaintiff lost in the end. The court will be guided by the persuasive decision in the case of FILM ROVERS INTERNTIONAL LTD AND OTHERS VERSUS COMMON FILM SALES LTD [1986] 3 AER 772 where it was held inter alia that in *determining whether to grant an interlocutory injunction or not the question for the court was whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at the trial, outweighed the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at the trial.*

The Court has given due consideration of this guiding test along side the established ingredients for granting such a relief and applied them to the facts demonstrated herein, and proceeds to make the following findings

(1) On establishment of a prima facie case with a probability of success, the court, is satisfied that this has been demonstrated because:

(i) There is no dispute that plaintiffs are beneficiaries of the pension scheme whose sponsor is the 1st defendant.

(ii) There is no dispute that the claim of the Plaintiffs as laid though subject to proof has not been recognized as one of the liabilities to be taken over by the new entities to be created.

(iii) There is no dispute that upon such merger taking place the 1st defendant will shed off its old coat and the old licence cancelled.

In this Courts opinion in view of the fact that the plaintiffs liabilities has not been recognized, by the merger, and the sponsor of the scheme is likely to change its entity, in the interests of justice the scenario calls for protective measures to be put in place to protect the interests of both parties so that the proceedings here in are not rendered nugatory.

The second ingredient deals with the issue of suffering irreparable loss. Indeed the claim of the plaintiffs if accepted to be taken over by the new entity can be quantified and paid over to them as damages. This means that in order for the plaintiffs to pass this hurdle, they have to come within the exception to that rule. The exception developed by case law. One such instance is where the opponent has breached the law as was the case in the case of ALKMAN VERSUS MICHUKI [1984] KLR 353. In this case the court of appeal held that even where the injury suffered can be remedied by damages, but it is shown that the opponent has behaved in such a manner so as to breach the law, an injunction will issue because equity does not assist law breakers.

The next is the case of WAITHAKA VERSUS INDUSTIRAIL AND COMMERCIAL DEVELOPMENT CORPORATION [20001] KLB 374 a decision by a Court of concurrent jurisdiction where it was held that where the opponent has acted in a high handed or oppressive manner an injunction will issue even if damages would be an adequate compensation .

Applying these two exceptions to the facts herein, the court makes a finding that although the first defendant has a right to merge with any other entity of own choice, moving to do so in the manner it has done without taking cognizance of the plaintiffs claim against it is tantamount to acting in an oppressive manner in the opinion of this court. It is oppressive in that should the trustees ultimately be found to be liable to turn to the sponsor for any shortfall that may result, when the 1st defendant has already shed off its old clock and in circumstances which will require further litigation on the part of the plaintiffs in order to realize, that shortfall, can be safely be ruled to be oppressive to the plaintiff's. This would require that some measures be put in place so that in as much as the 1st defendant should be allowed to progress on with his merger, nonetheless the same should not be done to the detriment of the Plaintiffs claim.

On the balance of convenience this has been weighed and found that it tilts in favour of the plaintiffs that on the basis of facts displayed herein, protective measures need to be put in place firstly to prevent the proceedings from being rendered nugatory and secondly to avoid oppression, bearing in mind that when so ordered, the said injunctive relief can be granted upon terms that are also just to both parties.

Turning to the alternative relief , the court is of the opinion that this can form part of the condition for granting the injunctive relief.

It is however to be noted that the amount that the applicant is seeking is to the tune of Kshs 1,156,213,244.20 which is in excess of the amount pleaded in the amended plaint of Ksh s522,240,030.00. The new figure amounts to a new pleading and if this court were to attach any conditions it will do so on the basis of the amount pleaded.

For the reasons given in the assessment above, the court, is inclined to grant prayer 2 of the plaintiff's/applicant's application dated 2nd May 2008 and filed in Court on 6th may 2008, which order is to remain in force until the 1st defendant deposits in court Kshs 532,240.030 forming the sums claims in the plaint. Or alternatively furnishes acceptable guarantee for the payment of the same within a reasonable time as may be agreed upon between the parties.

(2) The Applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2008.

R.N. NAMBUYE

JUDGE

23.05.2008